TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 114.

EGISTO P. FABBRI, FREDERICK CHAUNCEY, AND ERNESTO G. FABBRI, PLAINTIFFS IN ERROR,

vs.

THOMAS MURPHY, LATE COLLECTOR OF CUSTOMS, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPEMBER 13, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 114.

EGISTO P. FABBRI, FREDERICK CHAUNCEY, AND ERNESTO G. FABBRI, PLAINTIFFS IN ERROR,

vs.

THOMAS MURPHY, LATE COLLECTOR OF CUSTOMS, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, [SEAL.] greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri, plaintiffs, and Thomas Murphy, defendant, a manifest error hath happened, to the great damage of the said Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri, as by their complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, A. D. 1875, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and
2 according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, chief justice of the said Supreme Court, the twelfth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

KENNETH G. WHITE, *Clerk.*

The foregoing writ is allowed.
December 17, 1874.

SAM'L BLATCHFORD.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to thirty-two inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Egisto P. Fabbri,
3 Frederick Chauncey, and Ernesto G. Fabbri, plaintiffs in error, against Thomas Murphy, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 20th day of July, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the one hundredth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

(Indorsed:) U. S. Supreme Court. Egisto P. Fabbri & others, pl'ffs in error, vs. Thomas Murphy, def't in error. Lowrey & Soren, att'ys for pl'ffs in error, 3 Broad street, New York.

The within writ is hereby allowed.
December , 1874.
Filed Dec. 18, 1874.

1 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-buildings in the city of New York, of the term of April, 1871, to wit, of the 27th day of September, in the year of our Lord one thousand eight hundred and seventy-one.

Witness, the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 27th day of September, 1871, in the April term of that year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-buildings in the city of New York, came Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri, by Porter, Lowrey & Soren, esqs., their attorneys, and brought into the said court, before the aforesaid judges
5 thereof, then there, their certain declaration against Thomas Murphy, being in custody, &c., of a plea of trespass on the case of promises; which said declaration follows in these words, that is to say:

6 In the circuit court of the United States for the southern district of New York, in the second circuit, April term, 1871.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri, by Porter, Lowrey & Soren, their attorneys, come and give the court to understand and be informed that heretofore, to wit, on the 2nd day of June, in the year 1871, an action was commenced in the court of common pleas for the city and county of New York, according to the laws of the State of New York and to the rules and practices of said court, by and in the name of said Egisto P. Fabbri and others against Thomas Murphy, upon the same cause and causes of action hereinafter set forth; and the summons in said action was filed in the office of the clerk of said on the day of , 187 . That the said defendant afterwards, by Noah Davis, esquire, his attorney, appeared in said action, and such proceedings were thereupon had therein that afterwards, to wit, on or about the 18th day of September, in the year 1871, upon a writ of cer-
7 tiorari, issued to the judge of said court, the record and proceedings in said cause were returned and the said cause removed to this court for further prosecution and trial, according to the laws of the United States in that behalf provided.

Which the said defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action be continued in this court.

And hereupon the said plaintiffs, by their said attorneys, complain of said defendant being in custody, &c., of a plea of trespass on the case, on promises, for that whereas, at the times herein alleged, the said plaintiffs were, and are now, citizens of the State of New York, and said defendant was, and is now, collector of the customs for the collection-district of the city of New York, the said defendant heretofore, to wit, on

the 20th day of March, 1871, to wit, at the city of New York, in the district aforesaid, was indebted to said plaintiffs in the sum of 3,436.05 gold dollars, lawful money of the United States of America, for so much
8 money, by the said defendant, before that time had and received, to and for the use of the said plaintiffs; and being so indebted, said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the city of New York aforesaid, undertook and promised the plaintiffs to pay them the said sum of money when he, the said defendant, should be thereunto afterwards requested. And whereas also, the said defendant afterwards, to wit, on the 20th day of March, 1871, to wit, at the city of New York, in the district aforesaid, was indebted to said plaintiffs in the further sum of $3,436.05 gold dollars, lawful money of the United States of America, for so much money by the said defendant before that time had and received, to and for the use of the said plaintiffs, to wit, the amount of alleged duties on certain merchandize, namely, on certain sugar which on the 31st day of December, A. D. 1870, and from that time till and on said 20th day of March, 1871, was in public store or bonded warehouse in the city of New York, and on said last named day was withdrawn therefrom for consumption, being the same sugar imported into and entered at the collection-district of the United States of the city of New York, on or about the 16th day
9 of November, in the year 1869, in the ship Her Majesty, from Manilla, said amount of alleged duties being at the rate of ten per cent. on the duties properly assessed on said merchandise, and being, on or about said 20th day of March, 1871, unlawfully assessed, demanded, exacted, and received at said city of New York from said plaintiffs, by the said defendant, then collector of the customs for the district aforesaid, under alleged authority and color of a law of the United States in that behalf provided, and involuntarily paid by the said plaintiffs under protest in writing, made to said defendant in due form of law; and being so indebted, said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the city of New York aforesaid, undertook and promised the plaintiffs to pay them the said sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at New York aforesaid, was indebted to the plaintiffs in the further sum of 3,436.05 gold dollars of like lawful money of the United States of America, for so much money, by the
10 said plaintiffs lent and advanced to the said defendant at his special instance and request; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at New York aforesaid, undertook and promised the said plaintiffs to pay the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant, afterwards, to wit, on the day and year last aforesaid, at the said city of New York, was indebted to the said plaintiffs in the further sum of 3,436.05 gold dollars, like lawful money of the United States, for so much money before that time paid, laid out, and expended by the said plaintiffs, to and for the use of the said defendant and at his special instance and request; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at said city of New York, undertook and promised the said plaintiffs to pay unto the said plaintiffs the said sum of money last above mentioned, when he should be thereunto afterwards requested.

Nevertheless the said defendant, although often afterwards re-
11 quested so to do, has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same or any part thereof to the said plaintiffs has hitherto altogether refused, and does still refuse, to the damage of the said plaintiffs, the sum of 3,436.05 gold dollars, and therefore the said plaintiffs bring their suit.

12 *Bill of particulars of plaintiffs' demand in a suit entitled as below and numbered* 1, *said suit being brought for the recovery of duties claimed to have been erroneously and illegally exacted by defendant, collector of the customs of the port of New York.*

No. of suit.	Title.	Name of importer.	Description of merchandise.	Place from which imported.	Name of vessel, &c.	Date of invoice.	Date of entry at custom-house.	Amount of duty claimed to have been exacted in excess.	Date of payment of said duties.	Day and year of filing protest.	Date of appeal.	Date of decision of appeal.
						1869.	1869.		1871.	1871.	1871.	1871.
1	Egisto P. Fabbri, Frederick Chauncey & Ernesto G. Fabbri against Thomas Murphy.	Fabbri & Chauncey.	1,963,458 pounds sugar..	Manilla.	Her Majesty.	June 1	Nov. 16	$3,436 05	Mar. 20	March 20	March 20	April 11

13 U. S. circuit court southern district of New York.

THOMAS MURPHY
ads.
EGISTO P. FABBRI & AL. } No. Plea.

And the said defendant, Thomas Murphy, by Noah Davis, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared, against the said defendant, and of this he puts himself upon the country.

And the said plaintiffs do the like, &c.

14 Therefore, the issue above joined is ordered by the said circuit court to be tried at the circuit court appointed to be held at the United States court buildings, in the city of New York, in and for the district and circuit aforesaid, on the third Monday of October, 1873.

And now, at this day, to wit, on the third Monday of October, 1873, before the judges aforesaid, at the United States court buildings, in the city of New York, comes the said defendant, by his attorney, George Bliss, esq., and Nathaniel Shipman, esq., U. S. district judge, holding the said circuit court, before whom the said issue was tried, hath sent hither his record, had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before Nathaniel Shipman, esq'r, U. S. district judge, holding the said circuit court within named according to the form of the statute in such case made and provided, come as well the within-named plaintiffs as the within-named defendant, by their respective attorneys within mentioned, and the jurors of the jury summoned to try the said

15 issue being called, also come; who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath, that the said defendant did not promise, in manner and form, as the said plaintiffs have within complained against him.

Therefore it is considered that the said plaintiffs take nothing by their said declaration; but that they be in mercy, &c.; and that the said defendant do go thereof without day, &c. And it is further considered by the said court now here that the said defendant do recover against the said plaintiffs thirty-two dollars and forty-five cents for his costs and charges by him about his defense in this behalf laid out and expended, by the said court now here adjudged to the said defendant, and with his assent, according to the form of the statute in such

16 case made and provided. And that the said defendant have execution thereof, &c.

Judgment signed this day of December, 1874.

R. E. STILLWELL,
Dep. Clerk.

(Endorsed:) Vol. 8, p. 130; U. S. circuit court. Egisto P. Fabbri & al. vs. Thomas Murphy. Judgment-record. Costs, $. Filed Dec. 7, 1874.

17 Circuit court of the United States for the southern district of New York.—October term, 1873.

EGISTO P. FABBRI, FREDERICK CHAUNCEY, & Ernesto G. Fabbri
against
THOMAS MURPHY.

Bill of exceptions filed by the plaintiffs at the October term, A. D. 1873, of said court, upon the trial to the jury of the above-entitled cause.

Be it remembered that in the trial of the above-entitled cause, the plaintiffs excepted to the refusal of the court to instruct the jury in matter of law as requested by the plaintiffs, and to such refusal the plaintiffs then and there excepted, and file this bill of exceptions.

The action was of assumpsit, brought by the plaintiffs against the defendant, the collector of the port of New York, to recover three thousand four hundred and thirty-six $\frac{5}{100}$ dollars, with interest, being the amount of duties claimed by the plaintiffs to have been exacted by the defendant, in excess of the legal duties, upon a quantity of sugar imported by the plaintiffs into the port of New York and there stored
18 in a bonded warehouse. The sum in controversy was paid by the plaintiffs under protest.

Upon the trial of the cause before Hon. Nathaniel Shipman, sitting as circuit judge, and a jury duly impanelled, after issue joined, the following facts appeared in evidence offered by the plaintiffs.

In the month of November, 1869, the plaintiffs imported from Manilla, by the ship Her Majesty, 1,963,458 pounds of sugar.

On the 17th of November, 1869, they made entry of the sugars for warehouse, and on or about that date they were stored in a U. S. bonded warehouse at No. 750 Water street, in the city of New York. The original warehouse entry and the official weigher's return were put in evidence, from which it appeared that the weight of the sugar as corrected was 1, 963,458 pounds.

The sugars were originally classified on the warehouse entry by the appraiser as not above No. 12 Dutch standard in color, and on the 17th of January, 1870, the duties were assessed on them at three cents a pound under the then existing tariff.

On the 20th of March, 1871, the plaintiffs made a withdrawal
19 entry for consumption of the sugars in question, which up to this time, and ever since November 18, 1869, had remained in the warehouse where they were first stored.

On the 16th of January, 1871, as appeared by a memorandum upon the warehouse entry, the sugars were reclassified by the appraiser, under the act of December 22, 1870, as being not above No. 7 Dutch standard, and the rate of duty noted by him on the entry at $1\frac{3}{4}$ cents per pound.

On the 20th of March, 1871, the duties on the sugars were finally liquidated by the customs-officer, as follows: (1st) A duty of $1\frac{3}{4}$ cents per pound or $34,360.50 gold on 1,963,458 pounds; and (2nd) an additional duty of $3,436.05 gold, or ten per centum on the amount of the duty at $1\frac{3}{4}$ cents per pound, the two sums amounting together to the sum of $37,796.55 gold.

At the time of the withdrawal of the sugars, on the 20th of March, the defendants exacted and the plaintiffs paid this whole amount.

The additional duty of $3,436.05 gold or 10 per cent. on the amount

of the duty at 1¾ cents per pound was assessed and exacted from the plaintiffs, on the ground that the goods had remained in ware-
20 house for more than one year, to wit, from November 17, 1869, to March 20th, 1871.

At the time of said payment the plaintiffs protested against the liquidation and exaction of said additional duty of $3,436.05, and gave proper notice in writing to the collector of their dissatisfaction with his decision.

On the same 20th day of March, 1871, the plaintiffs appealed from the decision of the collector to the Secretary of the Treasury. There was no question of the sufficiency of the protest or appeal.

On the 11th of April, 1871, the Secretary of the Treasury made his decision upon the appeal, affirming the collector's decision. This decision was received by the plaintiffs on the 12th of April, 1871. Suit and all other proceedings on the part of the plaintiffs were brought in due time.

It was admitted on the trial that the interest at six per cent. on $3,436.05, the amount of the additional duty of ten per cent. from the 20th day of March, 1871, to the 6th day of February, 1874, was $593.27, making the total amount of the additional duty with interest $4,029.32 gold.

21 The defendant offered no testimony.

Counsel for plaintiffs requested the court to direct the jury to find a verdict for the plaintiffs.

The court refused to give such direction, and the plaintiffs' counsel duly excepted to such refusal.

Plaintiffs' counsel then requested the court to charge the jury as follows:

First. That if they find the sugars in question were not above No. 7 Dutch standard in color, and were in public store or bonded warehouse on the 31st day of December, 1870, and so continued until the 20th day of March, 1871, and were on that day entered for withdrawal for consumption, they were subject to no other duty upon such entry for consumption than at the rate of 1¾ cents per pound, to wit, the sum of $34,360.50.

Second. If they find that the sugars in question were not above No. 7 Dutch standard in color, and were in public store or bonded warehouse on the 31st day of December, 1870, and so continued until the 20th day of March, 1871, and were on that day entered for withdrawal for consumption, and the collector then exacted, and the plaintiffs paid ten per cent. additional on said sum of $34,360.50 gold, to wit: the sum
22 of $3,436.05, making a total of $37,796.55 gold, that then said additional ten per cent., to wit, the sum of $3,436.05 gold was illegally exacted.

Third. That the plaintiffs are entitled to recover said additional sum of $3,436.05 in gold coin of the lawful coinage of the United States, with interest at six per cent. per annum in the like gold coin, from the 20th day of March, 1871, to wit, the sum of 4,029.32 gold.

The court refused to instruct the jury as requested by the plaintiffs in each of said propositions, and charged the jury that upon the uncontradicted evidence in this case the defendant is entitled to a verdict. The court having refused to instruct the jury as requested by the plaintiffs in each and all the propositions hereinbefore set forth, the plaintiffs' counsel excepted to such refusals respectively, and also to the refusal of the court to each of said requests. They also excepted to the said instructions so given by the court to the jury.

The jury thereupon, under the direction aforesaid, returned a verdict for the defendant.

And inasmuch as the aforesaid matters do not appear by the record, the plaintiffs' counsel requested the judge of said court to allow
23 and sign this bill of exceptions, and the judge did, in pursuance of said request and of the statutes in such case provided, so allow and sign this bill of exceptions containing the several matters aforesaid, at and during the term of the court aforesaid, to wit, at the October term of said court, A. D. 1873.

N. SHIPMAN,
Judge.

24 The foregoing bill of exceptions having been settled by consent of the attorneys of the respective parties, it is hereby stipulated that the same may be signed and sealed by Mr. Justice Shipman, before whom the cause was tried as and for the bill of exceptions in this cause.

Dated N. Y., March 25th, 1874.

H. E. S.

GEORGE BLISS,
U. S. Att'y for Def't.
PORTER, LOWREY & SOREN,
Att'ys for Plaintiffs.

(Endorsed:) U. S. circuit court southern district of New York. Egisto P. Fabbri & o'rs vs. Thomas Murphy. Bill of exceptions. Porter, Lowrey & Soren, plaintiffs' att'ys, 78 Broadway, N. Y. City. Filed Ap'l 4, 1874.

25 Supreme Court of the United States of October term, in the year of our Lord one thousand eight hundred and seventy-five.

EGISTO P. FABBRI, FREDERICK CHAUNCEY, & Ernesto G. Fabbri *against* THOMAS MURPHY. } In error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Egisto P. Fabbri, by Grosvenor P. Lowrey, their attorney, and say that in the record and proceedings aforesaid there is manifest , in this, to wit:

1. That the court refused the request of counsel for the plaintiffs that it should direct the jury to find a verdict for the plaintiffs.

2. That the court refused the request of counsel for plaintiffs that it should charge the jury that if they find the sugars in question
26 were not above No. 7 Dutch standard in color, and were in public store or bonded warehouse on the 31st day of December, 1870, and so continued until the 20th day of March, 1871, and were on that day entered for withdrawal for consumption, they were subject to no other duty upon such entry for consumption than at the rate of 1¾ cents per pound, to wit, the sum of $34,360.50.

3. That the court refused the request of counsel for plaintiffs that it should charge the jury that if they find the sugars in question were not above No. 7 Dutch standard in color, and were in public store or bonded warehouse on the 31st day of December, 1870, and so continued until the 20th day of March, 1871, and were on that day entered for withdrawal for consumption, and the collector then exacted, and the plaintiffs paid ten per cent. additional on said sum of $34,360.50 gold, to wit,

the sum of $3,436.05, making a total of $37,796.55 gold, that then said additional ten per cent., to wit, the sum of $3,436.05 gold was illegally exacted.

27 4. That the court refused the request of counsel for plaintiffs that it should charge the jury that the plaintiffs are entitled to recover said additional sum of $3,436.05 in gold coin of the lawful coinage of the United States, with interest at 6 per cent. per annum, in the like gold coin, from the 20th day of March, 1871, to wit, the sum of $4,029.32 gold.

5. That the court directed the jury to find a verdict for the defendant.

And the said Egisto P. Fabbri, Frederick Chauncy, and Ernesto G. Fabbri pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought to all things which they have lost by occasion of the said judgment.

GROSVENOR P. LOWREY,
Attorney for Plaintiffs in Error.

28 (Indorsed:) Supreme Court of the United States. Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri against Thomas Murphy. Assignment of errors. Grosvenor P. Lowrey, plaintiffs' attorney, 197 Broadway, N. Y. City. Filed July 2, 1875.

29 Supreme Court of the United States.

EGISTO P. FABBRI, FREDERICK CHAUNCEY, AND Ernesto G. Fabbri, plaintiffs in error,
against
THOMAS MURPHY, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, in the October term, in the year of our Lord one thousand eight hundred and seventy-five, the said Thomas Murphy, by George Bliss, his attorney, freely comes here into court and says that there is no error, either in the record or proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the said Supreme Court of jurisdiction before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

GEORGE BLISS,
U. S. Attorney for Defendant in Error.

(Indorsed:) Supreme Court of the United States. Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri, plaintiffs in error, against Thomas Murphy, defendant in error. Joinder in error. George Bliss, U. S. att'y for def't in error. Filed July 16, 1875.

30 Supreme Court of the United States.

EGISTO P. FABBRI, FREDERICK CHAUNCEY, & Ernesto G. Fabbri
vs.
THOMAS MURPHY.

Know all men by these presents that we, Charles H. Coster, of the city of New York, and H. W. Barnes, of the city of Brooklyn, are held and firmly bound unto Thomas Murphy, of the city of New York, in the

sum of three hundred dollars lawful money of the United States, to be paid to the said Thomas Murphy, his executors, administrators, or assigns, to which payment, well and truly to be made, we, and each of us, the heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated this sixteenth day of December, 1874.

Whereas the above-named Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri have prosecuted a writ of error to the Supreme
31 Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Egisto P. Fabbri, Frederick Chauncey, and Ernesto G. Fabbri shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

CHA'S H. COSTER. [L. S.]
H. W. BARNES. [L. S.]

Sealed and delivered in presence of—
JAMES S. DOUGLASS.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles H. Coster and H. W. Barnes, being severally duly sworn, each for himself says, he is a resident and freeholder within the State of New York, and is worth the sum of six hundred dollars over and above
32 all his debts and liabilities and exclusive of property exempt by law from execution.

CHA'S H. COSTER.
H. W. BARNES.

Sworn to before me this 16th day of December, 1874.
[L. S.] JAMES S. DOUGLASS,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this 16th day of December, 1874, before me personally appeared Charles H. Coster and H. W. Barnes, to me known to be the persons described in and who executed the foregoing undertaking, and acknowledged that they executed the same.

[L. S.] JAMES S. DOUGLASS,
Notary Public, N. Y. Co.

(Endorsed:) U. S. Supreme Court. Egisto P. Fabbri & others vs. Thomas Murphy. Undertaking. Lowrey & Soren, att'y for pl'ff in error, 3 Broad st., N. Y. City. The within undertaking is hereby approved as to the form and amount thereof and the sufficiency of the surety. December 17th, 1874. Sam'l Blatchford. Filed Dec. 18th, 1874.

33 UNITED STATES OF AMERICA, *ss:*

To Thomas Murphy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the southern district of New York, wherein Egisto P. Fabbri, Frederick Chauncey,

and Ernesto G. Fabbri are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment on the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the said circuit court of the United States this 17th day of December, in the year of our Lord one thousand eight hundred and seventy-four.

SAM'L BLATCHFORD.

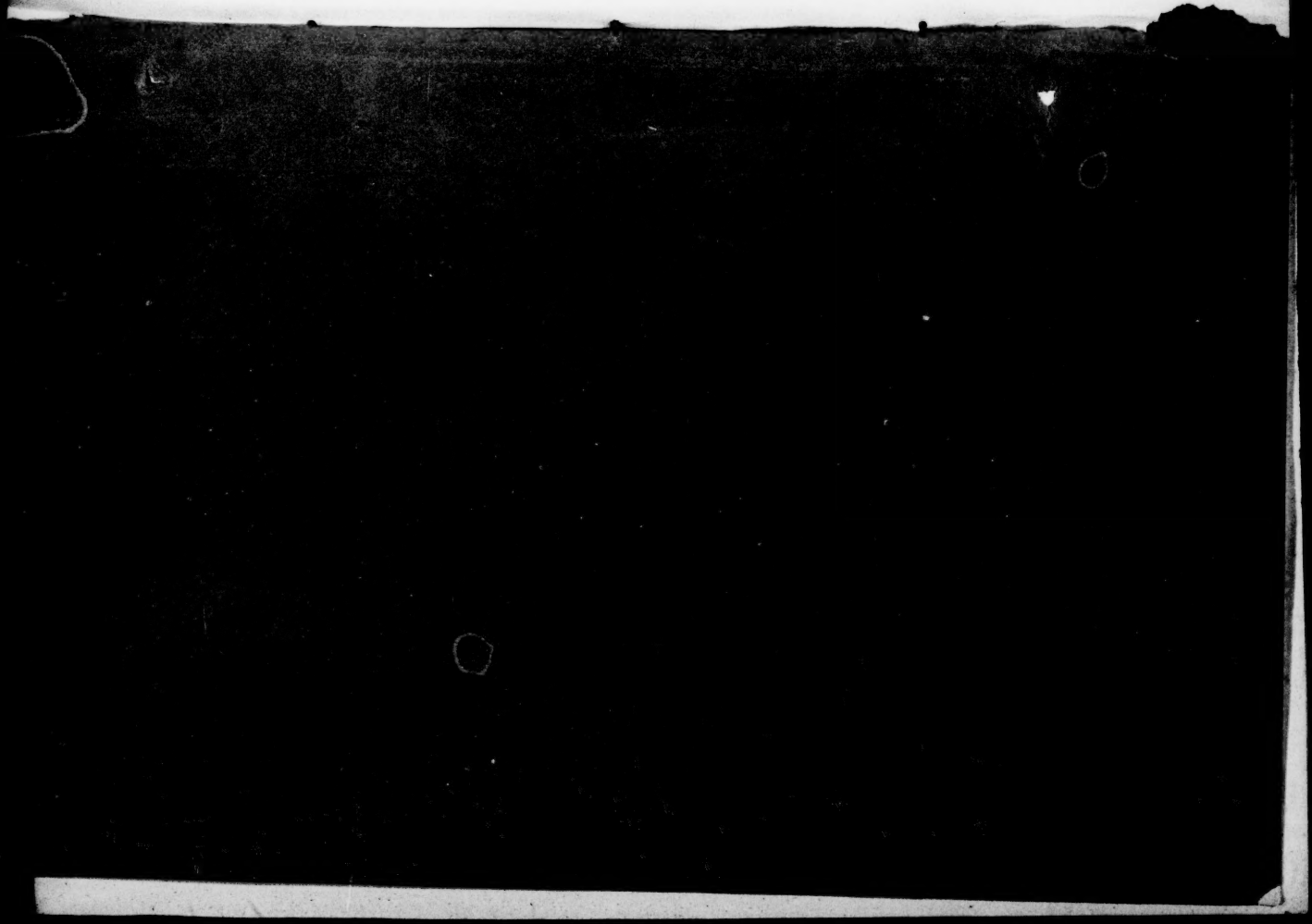
34 (Indorsed:) U. S. Supreme Court. Egisto P. Fabbri & others, pl'ffs in error, vs. Thomas Murphy, def't in error. Citation. Lowrey & Soren, att'ys for pl'ffs in error, 3 Broad street, N. Y. City.

Service of the within citation is hereby admitted.
New York, Dec. 17, 1874.

GEO. BLISS,
Att'y for Def't.

Filed Dec. 18, 1874.

(Indorsement on cover:) No. 114. Egisto P. Fabbri, Frederick Chauncey, & Ernesto G. Fabbri, plaintiffs in error, vs. Thomas Murphy, late collector of customs, &c., S. New York C. C. U. S. Filed 13th September, 1875.



Supreme Court of the United States.

October Term, 1877. Case No. 114.

EGISTO P. FABBRI and others,
Plaintiffs in Error,

vs.

THOMAS MURPHY, late Collector, &c.,
of New York,
Defendant in Error.

Brief of Plaintiffs in Error.

(1.) Statement of the Case.

In November, 1869, the plaintiffs imported from Manila into the port of New York, 1,963,458 pounds of sugar.

November 17, 1869, they made entry of the sugars for warehouse, and on or about that day they were put into bonded store in the City of New York.

January 16, 1871, the sugars were assessed with duties at the rate of 1¾ cents a pound as being not above No. 7 Dutch Standard.

There is no dispute about the classification or the rate of duty.

The goods remained in warehouse from November 18, 1869, until March 20, 1871, when they were withdrawn by plaintiffs for consumption.

The Collector then, against due protest by the plaintiffs, exacted (1) $34,360, being duties at the rate

of 1¾ cents a pound on 1,963,458 pounds; (2), an additional duty of $3,436.05 gold, being ten per centum of the above amount of duties.

The additional duty of ten per cent. was exacted on the ground that the goods had remained in warehouse more than one year at the time of withdrawal.

Protest, appeal, suit, and all other formal proceedings on the part of the plaintiffs were regular and sufficient.

The plaintiffs contend that the goods were subject on withdrawal for consumption on March 20, 1871, to duties only at the rate of 1¾ cents a pound, being the rate on such sugars provided by law at the time of withdrawal, and they relied on the provision of section 26 of the Act of July 14, 1870, entitled "An Act to reduce national taxes, and for "other purposes, &c.," in these words: "All im- "ported goods, &c., which may be in the public "stores or bonded warehouses on the day and year "this act shall take effect, shall be subjected to no "other duty upon the entry thereof for consumption "than if the same were imported respectively after "that day" (16 U. S. Stats., 269).

The act was approved July 14, 1870, and took effect generally on that day. But parts of it were made to take effect on other days. The sections relating to duties took effect after the 31st December, 1870. The plaintiffs' sugars were in warehouse on and before July 14, 1870, and on and after December 31, 1870: indeed, continuously, from November 18, 1869, to March 20, 1871.

The contention of the Collector was that, although the sugars were subject to duties at the rate provided by law at the time of withdrawal, to wit: the rate of 1¾ cents a pound, they were also subject to an additional duty of ten per cent. on the amount of duties at that rate, in virtue of the law of March 24, 1866 (14 Statutes at Large, 8), because they had been in bonded warehouse at the time of withdrawal more than one year from the date of their original importation.

The plaintiffs brought suit to recover the amount of the ten per cent. additional duty.

The cause was tried before Hon. Nathaniel Shipman, United States District Judge, and a jury, and upon direction of the Court the jury found a verdict for the defendant.

(2.) Errors Assigned..

(1.) There being on the trial no dispute as to the facts above recited, the counsel for the plaintiffs, at the close of the testimony, requested the Court to direct a verdict for the plaintiffs, and, this being refused, error is assigned on that ground.

(2.) Error is further assigned in that, the Court refused the request of the plaintiffs' counsel that it should charge the jury that, if they found the sugars in question were not above No. 7 Dutch Standard in color, and were in public store or bonded warehouse on the 31st day of December, 1870, and so continued until the 20th day of March, 1871, and were on that day entered for withdrawal for consumption, they were subject to no other duty upon such entry for consumption than at the rate of $1\frac{3}{4}$ cents per pound—to wit: the sum of $34,360.50.

(3.) Error is further assigned in that, the Court refused the request of the plaintiffs' counsel that it should charge the jury that, if they found the sugars in question were not above No. 7 Dutch Standard in color, and were in public store or bonded warehouse on the 31st day of December, 1870, and so continued until the 20th day of March, 1871, and were on that day entered for withdrawal for consumption, and the Collector then exacted and the plaintiffs paid ten per cent. additional on said sum of $34,360.50 gold, to wit, the sum of

$3,436.05, making a total of $37,796.55 gold, that then said additional ten per cent., to wit, the sum of $3,436.05 gold, was illegally exacted.

(4.) Error is further assigned in that, the Court refused the request of the plaintiffs' counsel that it should charge the jury, that the plaintiffs were entitled to recover said additional sum of $3,436.05 in gold coin of the lawful coinage of the United States, with interest at 6 per cent. per annum, in the like gold coin, from the 20th day of March, 1871, to wit: the sum of $4,029.32 gold.

(5.) Error is further assigned in that the Court directed the jury to find a verdict for the defendant.

Plaintiffs' Bill of Exceptions appears at pages 7 to 9 of the Transcript of Record; and their Assignment of Errors at pages 9 and 10.

(3.) Points of Law or Fact.

The facts are undisputed and are set forth under the heading "statement of the case."

As to points of law, the plaintiffs in error here contend that in virtue of the clear provisions of Section 26, of Act of July 14, 1870, and especially of that clause, which provides that goods in warehouse at the time that act took effect should be subject to no other duties on entry for consumption, than if they had been imported after that day, they were entitled to withdraw their sugars for consumption, on payment of duties, at the rate of 1¾ cents a pound, and no more; and that the Collector's exaction of ten per cent. additional duty, was without authority of law. They contend that the provisions of section 26 of the Act

of 1870 were independent of all other provisions, and contained the whole rule for estimating the duties on their goods. And they contend that the provisions of the Warehouse Act of March, 1866, appealed to by the Collector, had no application against the clear provisions of the Act of 1870.

POINTS.

First.—The explicit provisions of Section 26 of the Act of 1870 are sufficient to sustain the plaintiffs' claim.

The language of that section is; "all imported "goods, wares and merchandise which may be in "the public stores or bonded warehouses, on the "day and year this act shall take effect, shall be "subjected to no other duty, upon the entry thereof "for consumption, than if the same were imported "respectively after that day."

Compare the succeeding clause of that section, providing for a refund of the difference between the old duties and the new, in cases where duties on goods in warehouse had been actually paid before the day when the act took effect.

The Collector's exaction is not only forbidden by the Act of 1870, but it is not even apparently authorized by the terms of any other. He appeals to the Act of 1866. But that act directed that the goods withdrawn should pay "the *duties assessed on the* "*original entry* and charges, and an additional duty "of ten per cent. *on the amount of such duties* "*and charges.*"

But the Collector in this case has exacted the ten per cent. additional duty *not* on the "duties as-"sessed on the original entry," but on the new duties at the rate of $1\frac{3}{4}$ cents a pound prescribed by the Act of 1870.

The Collector's action admits that the only *basis* on which Congress ever authorized a calculation of

the additional ten per cent. is taken away, but he does not hesitate to estimate the percentage on a new basis, without any other sanction than the assumption that Congress intended that such a clumsy and inharmonious provision should be generated between the two acts.

The thing which the Collector has done singularly violates both the letter and the spirit of both acts.

The Act of 1870 reduced duties, and its explicit provisions, and also those of the Joint Resolution of Jan. 30, 1871, (16 U. S. Stats., 592) indicate the design of Congress to give the benefit of the reduction to all goods not yet entered for consumption. But in exacting an additional ten per cent. upon the new duties, the Collector defeats the beneficent design of Congress by making the importer who withdraws goods from warehouse on the 1st January, 1871, pay ten per cent. more duties than the importer who brings in goods on that day. He levies *a* ten per cent. additional duty by virtue of the Act of 1866, but he does not levy *the* ten per cent. authorized by that Act. He concedes that he has no right to exact the ten per cent. of the Act of 1866, because the subject of it is taken away. Therefore, the ten per cent. which he does levy is entirely a device of his own.

"The difficulty appears to me insuperable, to un-
"dertake to apply the 3d Section of the Act of
"August 5th, 1861, to the article of wool, which is
"subjected to duty under the Act of March 2d,
"1861, or to the articles of goat skins and cotton,
"which are charged with duty under the Act of
"July 14th, 1862, when, by the very terms of such
"3d section, the additional duty there imposed is in
"addition to the duty fixed by that act, of which
"the section is a part.

"If the language used had been, as in some of
"the sections of the Act of July 14, 1862, 'in
"'addition to the duties heretofore imposed by law,'

"or if the section had used language, which has "never yet been used, I think, in any Tariff Act, 'in "'addition to the duties that may hereafter be im-"'posed by law,' the construction claimed by the "Government might very well be sustained. But "no such language is used. On the contrary, the "language is, as we have seen, 'in addition to the "'duties imposed by this Act.'"

Per Nelson, J., in Echeverria *v.* Barney, 5 Blatchf. 193.

In the face of the plain words of the Act of 1870, that goods in warehouse "shall be subjected to no "other duty upon the entry thereof for consump-"tion than if the same were imported after" December 31, the Collector, in order to sustain his action here, must find in the law somewhere a provision to this effect: "*provided* that if any such "goods in warehouse as aforesaid shall have been "in bond more than one year and less than three "years from the date of importation, they may be "withdrawn only on payment of the duties pre-"scribed by this act and an additional duty of 10 "per cent. of such duties."

The plaintiffs contend that Congress meant no such thing. The very language employed shows that Congress expressly contemplated withdrawals of warehoused goods; that it had in mind the warehousing laws in this very clause; and if, in view of the beneficial character of the Act of 1870, so detrimental a discrimination against the owners of warehoused goods was intended, the design would have been clearly expressed. This the plaintiffs contend upon the mere face of the Act of 1870.

But further, when Congress has upon former occasions intended such things, it has expressed its intent in plain terms.

See, for example, Act of 1861, chap. 45 (12 U. S. Stats., 292), "An Act to provide increased revenue," etc.

The Act was passed August 5, 1861, and the new duties were to be levied from and after its passage.

Section 5 provided that all goods in warehouse at the date of the passage of this Act shall be subject to pay such duties as are provided by law before and at the time of the passage of this Act, provided that if designed for consumption in the United States, they be withdrawn in three months. But if the owner neglects to pay the duties within three months from their deposit, then he may enter them for consumption within two years, by paying the legal duties and 25 per cent. additional.

And see a provision of the same character in § 21 of Act of July 14th, 1862 (12 U. S. Stats., 543), "An Act increasing temporarily the duties," etc.

By the second clause of § 26 of the act of 1870 "*all* goods remaining in warehouse" on the day when the act takes effect, are placed on the same footing, no distinction being made between those which had been there less than one year and those which had been there more than one and less than three years. If the Act of 1866 applies, the former class could be withdrawn on payment of the duties existing at the time of withdrawal, and the latter only on payment of the duties assessed on the original entry and ten per cent. additional. The second clause of the Act ignores this difference between these two classes of cases altogether.

The terms of the "Joint Resolution declara-"tory of the meaning" of the Act of July 14, 1870, are significant in support of the plaintiffs' construction of Section 26. (16 U. S. Stats., 592.)

The Resolution provides that "all foreign merchandise which arrived at a port of the United States on or before Dec. 31, 1870, and not entered or transferred to a public store or bonded warehouse, shall be entitled to the benefits" of the Act of July 14, 1870, "the same as such merchandise would have been entitled to, had it actually been in public store or bonded warehouse on or prior to 31st Dec., 1870."

If it had been then entered for warehouse and had

remained on the 31st day of December, it would clearly have been liable to the lighter duties imposed by the Act of 1870, and to no other.

Merchandise arriving in port on the 31st of December, for example, would be liable to the high rates of duty then existing, and the "benefit" contemplated by the act seems to be clearly the difference between the old high rate and the lower one provided by the Act of 1870, and, by the language here employed, supposed to be secured to all classes of goods in warehouse on the 31st day of December.

Second.—If there can be any doubt, in view of the Warehousing Act of 1866, that the Act of 1870 means just what it plainly says, and so any surmise be admissable that the Collector may have been justified in imposing the additional duty provided by the Act of 1866, it may be expedient to examine acts of similar character, both warehousing and tariff laws, of earlier date than those under consideration.

The provisions of the Section 26 of the Act of 1870 are not peculiar to that act, nor strange in the revenue system. Such a provision in almost identical language occurs in several earlier tariff acts, and it seems to be a characteristic provision of all acts reducing duties. In such acts it seems clearly intended to be beneficial to the importer, and should be construed liberally, if need be, in his favor.

In only one instance, it is believed, after very careful examination of all the laws since 1842, does such a provision stand in the act unqualified by provisions in favor of goods in warehouse. This is in the instance of the Act of June 30, 1864, entitled "an Act to increase the duties."

Going back over a period which covers at least all the Statutes relating to goods in warehouse, five Statutes in all are found which contain, in almost identical words, this provision of Section 26 of the Act of 1870, to wit.:

(1) Tariff Act of 1846, Ch. 74 (9 Stats., 42), entitled "an Act reducing duties, &c."
(2) Act of 1857, Ch. 98 (11 Stats., 192), entitled "an Act reducing the duty on imports, &c."
(3) Act of 1861, Ch. 68 (12 Stats., 178), entitled "an Act to regulate and fix the duties on imports, &c."
(4) Tariff Act of June, 1864, Ch. 171 (13 Stats., 216), entitled "an Act to increase the duties."
(5) Act of 1870, Ch. 255 (15 Stats., 256), entitled "an Act to reduce internal duties, &c."

The tariff Act of 1842, § 12, had provided, in the nature of a warehousing provision, that all goods on which duties were not paid in cash on entry, should be sent to public store, there to remain for 60 days (90 days in case of goods from beyond Good Hope), and then to be sold to realize the duties.

The Act of 1846 was passed July 30, and the reduced tariff which it enacted was to go into effect from and after December 1st of that year.

The Act also amended § 12 of the Act of 1842, changing the periods of 60 and 90 days to one year.

If it had not been for the provisions of Section 6 of the Act of 1846, goods imported under the Act of 1842, after July 30, 1846, and in warehouse on the 2d December, would have been subject to the higher rates prescribed by the Act of 1842.

But Section 6 provided that all goods imported after the passage of this Act (July 30), and which may be in the public stores on the 2d day of December next, shall be *subject to no other duty upon the entry thereof than if the same were imported respectively after that day.*

The second of the Acts above referred to was passed March 3d, 1857 (11 Stats., 192).

Between the act of July 30, 1846, and this Act of 1857 certain acts concerning warehoused goods had been passed. These were the three Acts of 1846—Ch. 84 (9 Stats., 53), the so-called Warehousing Act:

the Act of 1849, Ch. 110 (9 Stats., 398), and the Act of 1854, Ch. 30 (10 Stats., 270).

The provisions of these acts may be summarized thus:

By Act of 1846 goods might be warehoused

1. For unpaid duties.
2. Upon entry for warehouse.

To remain for one year.

By Act of 1849—

Goods not paying duties to be warehoused.
Withdrawn for consumption in one year.
Withdrawn for export in two years.

By Act of 1854—

(1) Goods entered for warehouse.
(2) Now in warehouse.
Withdrawn for consumption } in three years.
Withdrawn for export }

Until the Act of 1857, reducing duties after July 1, goods in warehouse could be withdrawn only on payment of the old and higher rates.

But this act provided that "all goods, &c., which "shall be in the public store on the 1st day of July "shall be *subject, on entry thereof for consump-* "*tion, to no other duty than if the same had been* " *imported respectively after that date.*"

Both the Acts of 1846 and 1857, being acts reducing duties, by their clear provisions just quoted, designed to give the importer, whose goods had not been putinto consumption, but were still in warehouse, the benefit of the reduced tariffs provided by these acts, and to put himon equal footing with importers whose goods arrived after the day when the acts took effect. The acts make no exception, in respect to this benefit, on the ground of the period during which the goods had been in store, but *all* goods in store at the respective dates of the operation of the acts are admitted to entry at the new and lower rates of duty.

That the design of this class of acts is, at all events, to give goods in warehouse the benefit of reduced duties, appears more clearly from the third act above referred to, to wit: that of March 2, 1861.

This act increased certain duties. But the 25th section provided that all goods which were in public store on the day when the act took effect, April 1, 1861, should be *subject to no other duty upon the entry thereof than if the same were imported after that day.*

The effect of this provision in this instance would have been to charge some goods in warehouse with the increased duties. But there was an inconsistent provision in the act which was intended, as in the case of the former acts already considered, to benefit such goods, to wit, § 33, which provided that "all goods actually on shipboard within 15 days after the passage of this act, and all goods in warehouse on the 1st of April, 1861, shall be subject to pay such duties as are provided by law before and at the time of the passage of the act, and all goods in a warehouse at the time this act takes effect *on which the duties are lessened by its provisions*, may be withdrawn on payment of the duties herein provided."

The provisions of section 25 were evidently not intended to be a part of the act; and by a joint resolution dated March 2, 1861, (12 Stats., 252) section 25 (improperly, however, there designated as section 24), was expunged—leaving the beneficial provisions of section 33, in virtue of which the importer got the benefit of the lower duties, in full effect.

The next of the five Acts above referred to was that of June 30, 1864.

The Act of 1854, Ch. 30, it has been seen, developed the warehousing system to the most liberal extent, permitting withdrawals for consumption

as well as for export for three years from importation.

There was no change of these periods, nor in the warehousing law at all, until the Act of August 5, 1861. This was an act to provide increased revenue, etc. It was the first act of the sort after the beginning of the war.

It might well have been expected that, under the stress of its new necessities, the Government should make new and less favorable laws, in order to command larger and quicker revenues.

Between the Acts of March, 1861, and June 30th, 1864, accordingly, five acts were passed, which relate to warehoused goods. These shorten the periods of withdrawals, and one of them, the very first, provided for an additional duty of 25 per cent. for goods left in warehouse more than three months.

This act, and that of 1866, are the only two acts since 1842, which contain a provision of this character, to wit: an additional duty to be exacted according to the time of withdrawal after deposit in warehouse.

It will be seen, from a review of these special acts, that, throughout their whole period, all possible indulgence was given to the importer, and that as the necessity of the Government was lightened, the stringency of the warehouse laws was also correspondingly lightened.

The first of these five acts, Aug. 5, 1861, was "an Act to provide increased revenue" from the date of its passage.

Nevertheless, section 5 provided that "all goods on ship or in warehouse at the date of the passage of the act should be subject to pay such duties as existed before and at the time of the passage of the act, provided, however, that such warehoused goods should be withdrawn within three months."

If not withdrawn within three months then they were to pay legal duties and 25 per cent. additional.

The *second* Act, that of July 14, 1862, "an Act increasing temporarily the duties from August 1," provided (§ 21) that all goods in warehouse on the 1st August might be withdrawn on payment of the duties *now imposed by law* (that is, lower duties), if withdrawn in three months from importation; but if withdrawn after three months, they should pay the duties prescribed by this act, that is, the higher duties.

The *third* Act, March, 3, 1863, a beneficial act, provided (§ 1) that goods which had been in bond more than one year, and less than three years, when the Act of July 14, 1862, went into effect, might be entered for consumption and bond canceled any time before June 1, 1863, on payment of the duties prescribed by the Act of 1862.

And the *fourth* Act, February 29, 1864, "An Act "to extend the time for withdrawal," &c., allowed goods which had been in bond more than one and less than three years at the date of this act to be withdrawn for consumption up to September 1, 1864, on payment of legal duties.

The *fifth* Act, June 17, 1864, amendatory of the act preceding and apparently in contemplation of the act of June 30, 1864, provided that goods which had been in bond more than one year, and less than three, might be entered for consumption at the rate of duties in force at the time of withdrawal.

Of these five acts that of August 5, 1861, is the only one since 1842, which contains this feature of an imposition of an additional duty (25 per cent.) for delay beyond a fixed period to withdraw goods.

It was first introduced into the revenue at a time of the Government's urgent need. The same act imposed a direct tax of $20,000,000 on the States. But even here it is only introduced after careful provision giving the importer the full benefit of the lower duties that preceded this stringent act.

It is a feature which belongs to special occasions of necessity; it is entirely novel in and inconsistent with the general policy of the warehousing system, and has its motive and reason in the then existing policy of the duty laws.

As the strain on the Government was relieved, the law in respect to periods of withdrawal, and the rates to be paid on deferred withdrawals, became more lenient, and this special feature of an additional duty in such cases disappeared very early (see the acts subsequent to August, 1861).

The next duty act in order, that of June 30, 1864, was an act increasing duties after July 1, 1864, and it provided that goods in bond, on the last named day, should be *subject to no other duty than if they were imported after that date.*

This, as before said, was the only act which gave no benefit of prior lower rates to goods in warehouse; but it is to be remembered that several of the five acts which had preceded it had extended times of withdrawal, and that two of them had been passed within the same year, to wit: February 29th and June 17th; and these contained careful provisions in favor of the owners of warehoused goods.

But this was a period of great rigor in the exaction of revenues. In connection with the act see the Joint Resolutions of April and June, 1864, (13 Stats., 405, 411,) increasing by 50 per cent. even the high rates which it provided.

While the high rate of duties provided by the Act of July 14, 1862, prevailed, (and no other tariff act was passed until the Act of 1870, reducing duties) the Act of March 14, 1866, was passed.

Up to this time, it appears that goods in bond might be withdrawn for consumption at any time within one year from importation, and this on payment of the existing rates of duty.

The Act of 1866—the necessities of the Govern-

ment being less pressing—proposed to extend this period to three years, but upon the terms of a ten per cent. premium for delay after one and up to three years.

But it did not impose this penalty upon goods which had been then in bond more than one year, but, as was characteristic of all the acts, with a single exception, (if the Act of July, 1864 was an exception), the Act of 1866 first carefully provided for a general clearance of all warehoused goods up to May 1, if the owner should elect to withdraw them by that time at the then existing rates.

The ten per cent. additional duty must be regarded even as a mitigation and lightening of the hitherto severer policy of the tariff laws, and as the moderate price for two added years of indulgence for payment of high duties.

When, four years later, the Government finds itself in such easy financial condition that it can afford a large reduction on its whole tariff, it should seem not unsound to claim in view of the language of the section in question, and upon the precedent of all similar acts since 1842, that *all* goods then in warehouse should be subjected on entry for consumption to no other duty than those prescribed by the new act; and upon the reason of the thing, that the act especially designed to remove the additional duty of ten per cent., at the same time that it reduced the primary duties on the goods then in warehouse.

In support of such a construction of the Act of 1870, it is suggested,

1. The Act of 1870, in the clause in question, observes the uniform rule observed in all the acts since 1846, to wit: that of offering to the owner of warehoused goods a benefit—either, for a fixed period, that of the former lower tariff, in case of an increase of duties—or of the new lower tariff, if the goods were bonded under a higher one—the rule being in all these prior acts to give the importer the largest possible benefit in either case.

The Act of 1870 will have that effect, in harmony with such prior acts, by construing the section according to the contention of the plaintiffs.

2. Goods in warehouse are regarded by the revenue laws as, in a certain sense, not yet imported; and it is entirely consistent with their letter and spirit to regard all goods in warehouse as starting, at the date of a new law, on an equal footing with goods first arriving under that law.

"The better opinion is that the importation of "foreign goods is not complete, as between the im- "porter and the government, as long as the goods "remain in the custody of the officers of the cus- "toms. * * * The practice of the government "shows that goods in warehouse or on shipboard "have always been regarded as subject to new leg- "islation, both in respect to duties and in respect to "alteration in its warehouse laws."

U. S. *v.* Benzon, 2 Cliff., 525.

3. From the review that has been made of earlier acts, it clearly appears that the imposition of an additional duty for withdrawal made beyond certain limited periods, is not a characteristic feature of either warehouse or duty laws.

As to the former, it is inconsistent with and even repugnant to their spirit. Such an exaction is an incident of the duty laws *under special circumstances*, and when the policy of the tariff changes, the significance of the additional duty changes with it.

That is to say, for illustration, ten per cent. additional on goods subject to the duties prescribed by the Act of 1870, should only be imposed on goods entered in warehouse during the existence of those duties, and there remaining more than one year from date of importation, and so becoming subject

to the additional duty, according to the terms of the Act of 1866.

4. This condition is emphasized in this case by the language of the Act of 1866, which only permits the ten per cent. to be levied *on the duties assessed on the original entry.*

Echeverria *v.* Barney, 5 Blatchf., 193, is an explicit authority against the validity of an attempt to pervert such a provision as this in the way here attempted by the Collector.

5. It further appears that the feature of an additional duty for delayed withdrawals is singularly exceptional since 1842; it exists in only one act prior to 1866.

There, (Act of Aug. 5, 1861) 25 per cent. additional was imposed for delay beyond three months. The far more liberal conditions in the Act of 1866, both in respect to rate and time, reduce the significance and force of the additional imposition proportionally, and so far, that without any violence of presumption, in view of the explicit terms and general character of the Act of 1870, it may be assumed to have been the intention of Congress to abandon it in such a case as the present.

6. It is further submitted, in view of the acts considered here, that whenever new tariff laws have been passed, whether raising or reducing duties, the effect upon goods in warehouse, and especially the conditions, both as to rate of duty and terms of withdrawal of such goods, with reference to the new law, have been carefully adjusted by explicit provisions in all respects

And upon the precedent of earlier acts the plaintiffs confidently contend that if Congress had intended that goods in warehouse should be subjected to this additional exaction at all, it would have made plain declaration to that effect; and that as it has made a plain declaration to the contrary, the act must be held to mean just what it clearly says.

7. There is no necessity, in adopting the plaintiffs' construction of the act, for claiming a total repeal of the Act of 1866, nor even of the clause imposing the ten per cent., except so far as that is inconsistent with the express terms of the 26th section of 1870. The Act of 1870 put all goods in warehouse on the 31st December, 1870, on a footing with goods imported after that day. This leaves the Act of 1866 to operate thenceforth according to its tenor, and ten per cent. on the new duties might be exacted on withdrawals after one year. Then, the additional duty will be levied, according to the letter of the Act of 1866, "on the duties assessed on the original entry."

Third.—The judgment should be reversed.

GEORGE W. SOREN,
GROSVENOR P. LOWREY.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

EGISTO P. FABBRI AND OTHERS
vs.
THOMAS MURPHY, COLLECTOR. } No. 114.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Defendant's Brief.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

E ISTO P. FABBRI AND OTHERS
vs.
THOMAS MURPHY, COLLECTOR. } No. 114.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

DEFENDANT'S BRIEF.

STATEMENT.

Fabbri & Chauncey imported from Manila into New York, in November, 1869, 1,963,458 pounds of sugar, which, on the 17th day of that month, were stored in a United States bonded warehouse. The sugar was originally classified on the warehouse-entry as not above No. 12, Dutch standard, in color, and the duties were assessed thereon at 3 cents a pound January 17, 1870, under the then existing tariff. January 16, 1871, the sugar was reclassified, under the act of December 22, 1870, as not above No. 7, Dutch standard, and the duties were accordingly liquidated at $1\frac{3}{4}$ cents a pound March 20, 1871, on which day the sugar was withdrawn for consumption. This duty amounted to $34,360.50,

gold. Ten per cent. additional duty ($3,436.05) was also charged because the goods had remained in the bonded warehouse more than one year. Both sums, amounting to $37,796.55, were paid upon the withdrawal of the sugar, March 20, 1871, but the additional 10 per cent. was paid under protest and appeal from the collector's liquidation and decision. Proper proceedings were subsequently had, and, after an affirmance by the Secretary of the Treasury of the collector's action, this suit was seasonably brought by the importers to recover the $3,436.05, with interest from the time of its payment to the defendant. At the trial the plaintiffs requested the judge to charge, in substance, that the additional 10 per cent. was illegally exacted, but this request was denied, and the jury were told that, upon the uncontradicted evidence, the defendant was entitled to their verdict, which was rendered accordingly. To the instruction given and to those refused the plaintiffs duly excepted. (Record, 7, 8.)

The whole question, then, is whether or not, under the legislation had prior to March 20, 1871, the sugar was properly chargeable with an addition of 10 per cent. to the duty imposed upon like merchandise entered for consumption within a year of its importation.

STATUTES.

The statute or section supposed to affect the question arising in this case is this:

"SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation, on payment of the duties and charges *to which it may be subject at the time of such with-*

drawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties *assessed on the original entry* and charges, *and an additional duty of* 10 *per centum* of the amount of SUCH duties and charges."

This is a substantial re-enactment of the act of March 14, 1866, c. 17, (14 Stats., 8,) and is a *verbatim* repetition of so much of that act as relates to withdrawals after one year, which is all that affects the present case.

BRIEF.

This sugar was imported in November, 1869, and put into the warehouse on the 17th of that month. It was withdrawn for consumption March 20, 1871. The acts of July 14, 1870, c. 255, § 21, and of December 22, 1870, c. 6, (16 Stats., 262, 397,) reduced the duty on the importation of this low-grade sugar to 1¾ cents a pound from and after December 31, 1870. Under the statute of March 14, 1866, c. 17, above printed, the reclassification of the sugar was wrong; and, as it was not withdrawn within one year from entry, the liquidation should have been at the rate of 3 cents per pound, at which it was assessed upon the original entry, and the 10 per cent. additional for remaining in the store. But of this error the plaintiffs do not and cannot complain. They are not aggrieved that the full amount due the United States was not exacted.

The reduction of duty was only intended to affect the rate upon sugars subsequently imported or placed upon the market within one year of being put in bond; it was not designed to change the special statute relating

to the storage of goods in the bonded warehouses. There is no express repeal of the act of March 14, 1866, nor any fair implication of such repeal in the acts of July 14 and December 22, 1870, since the latter act does not contain any provisions negativing those of the act of March 14, 1866, c. 17; nor do these acts relate to the same subject; nor is there any necessary, *irresistable* implication of a repeal. (Wood *v.* U. S., 16 Peters, 362–3; McCool *v.* Smith, 1 Black, 470–1, and cases cited; Beals *v.* Hale, 4 Howard, 53; Pratt *v.* R. R. Co., 42 Maine, 587; Atty. Gen. *v.* Brown, 1 Wisc., 525; Lee *v.* Forman, 3 Metc., (Ky.), 116; Rawson *v.* Rawson, 52 Ill., 69.)

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